Supreme Court, U.S.
FILED
AUG 11 1999
OFFICE OF THE CLERK

No. 98-1986

IN THE

Supreme Court of the United States

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

v.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INC.,

-and-

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INC.

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PARTIES TO THE PROCEEDING

The parties to the proceeding are accurately listed on the Petition. Respondent American Automatic Sprinkler Systems, Inc. is a privately-held corporation. No parent or publicly held corporation holds 10% or more of American's stock.

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STATEMENT OF THE CASE

American Automatic Sprinkler Systems (herein referred to as "American Automatic" or "American") is an Owings Mills, Maryland firm engaged in construction-industry fabrication, installation and servicing of fire sprinkler systems. Pet. App. 3a.

Since it began operations in 1974, American had been a party to successive collective-bargaining agreements with Sprinkler Fitters Local 536, and with Local 669 (the Petitioner) by virtue of its membership in a multiemployer bargaining association. These negotiated collective-bargaining agreements established the terms and conditions of employment for American's journeymen and apprentice sprinkler fitter employees employed in the respective territorial jurisdictions of Locals 536 and 669. Pet. App. 4a. Local 536 jurisdiction encompassed Baltimore, Maryland and a surrounding zone. Local 669 claimed jurisdiction over American's operations outside the Baltimore area. Pet. App. 3a.

In late January, 1994, American notified both Locals 669 and 536 that it was withdrawing bargaining authority from the multiemployer association, and intended thereafter to bargain independently with the separate unions. Pet. App. 5a. Negotiating sessions were conducted separately with the two unions concerning possible collective bargaining agreements to replace the union contracts which were expiring that year. The Local 536 agreement expired by its terms on May 31, 1994, while the Local 669 agreement expired on March 31, 1994. Pet. App. 5a. American and the unions continued negotiations after the expiration of the contracts, and American maintained in effect the labor

terms (wages, hours and working conditions) of the expired agreements. Agreements were not reached, however, and in mid-August 1994, American determined that an impasse in bargaining had occurred with respect to each union. On August 11, 1994, consistent with its bargaining proposals, the employer implemented changes in wages and other employment matters. Pet. App. 6a. A number of unfair labor practice charges were thereafter filed with the Baltimore Regional Office of the National Labor Relations Board. The Regional Director issued a series of complaints against American, which were consolidated and heard in June 1995 over the course of nine days before an administrative law judge of the NLRB. Pet. App. 48a.

The administrative complaints against American included some allegations of discrimination against individuals, and certain claims of interference with employee rights, not at issue before this Court.[1] Of principal importance here, American was alleged to have violated Section 8(a)(5) of the National Labor Relations Act (herein "NLRA" or "Act"), 29 U.S.C. § 158(a)(5), by failing and refusing to bargain in good faith when it conducted negotiations in 1994 with the two union locals. Pet. App. 49a-51a.

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C. § 159(a)]". 29 U.S.C. § 158(a)(5). Section 9(a), in turn, provides that:

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1. The Court of Appeals denied enforcement of findings that employees had been "constructively discharged" by American. Pet. App. 28a-29a. Although still referring to those employees as "unlawfully constructively discharged" (Petition, at 3, note 2), Petitioner has not sought review in this Court of the constructive discharge ruling.

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

29 U.S.C. § 159(a). While the NLRB complaints issued against American alleged that majorities of American's employees in the two respective bargaining units had designated the sprinkler fitter locals as their bargaining agents, American consistently denied the existence of majority status in its answers to the various complaints.

At the administrative trial, the NLRB's case against American failed to include affirmative evidence that employees had designated the unions as their chosen bargaining agents. Instead, the NLRB's General Counsel and the local unions chose to rely upon American's bargaining history as proof of the required majorities.

The NLRB's administrative law judge disposed of the issue of majority status in a sentence: "Unquestionably, there exists a Section 9(a) relationship between both Locals 536 and 669 and the Company". Pet. App. 85a. On appeal to the NLRB itself, the Labor Board disposed of the bargaining-obligation issue in three paragraphs. Pet. App. 31a-33a. As to Local 669, the Petitioner before this Court, the Board relied on a 1987 "form recognition agreement — which was accompanied by fringe benefit forms demonstrating majority union membership — recognizing Local 669 as the 9(a) representative of its employees."

"The Board," the panel in *American Automatic* noted, "has previously found that this same form agreement is sufficient to establish 9(a) status." Finally, the NLRB found, American's:

> . . . challenge to the 9(a) status of Locals 669 and 536 was untimely raised. *Casale Industries*, 311 NLRB 951 (1993).

Pet. App. 33a. American sought review of the NLRB decision in the Fourth Circuit. On December 17, 1998, the court denied enforcement of the NLRB's findings of majority status and bargaining violations.

Addressing the timeliness issue first, as has Petitioner Local 669, the Fourth Circuit panel rejected the Board's conclusion of untimeliness in a long footnote. The court described the Board's effort in *American Automatic* and other cases to avoid inquiry into the circumstances of construction-industry recognition agreements later claimed to create Section 9(a) relationships. Pet. App. 19a-20a, note 6. The Court of Appeals, noting the Board's own decision in *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988), agreed with American that nothing in Section 10(b) of the NLRA "precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period . . . [where] [g]oing back to the beginning of the parties' relationship . . . simply seeks to determine the majority or non-majority based nature of the current relationship." Pet. App. 17a, note 6.

American respectfully submits that the Court of Appeals was correct. Petitioner devotes considerable energy to challenging the lower court's determination that an

examination of the circumstances of Local 669's claim of Section 9(a) bargaining status was not precluded by Section 10(b) of the Act. The Petitioner repeatedly casts its discussion as a debate pro or con on a "Bryan Manufacturing" rule or ruling. The Fourth Circuit, however, recognized that the issue was not simply the application of *Local Lodge 1424, Machinists v. NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960), but required an examination of the NLRB's ruling in *Casale Industries*, 311 NLRB 951 (1993), in light of the overall structure and purpose of the NLRA. Petitioner cites *Casale* (Petition, page 16), but does not cite the full NLRB discussion in that case. In *Casale*, the Board actually decided that a "challenge to majority status must be made within a *reasonable period* of time after Section 9 recognition is granted." *Id.* at 953 (emphasis added). It was only after that discussion that the *Casale* majority (the case was decided on a 2-1 vote) identified six months as being that "reasonable" period of time. Section 10(b) of the Act, 29 U.S.C. § 160(b), is a six-month limitation on certain actions under the NLRA, but the statutory provision literally proscribes only the issuance of complaints by the General Counsel, not an examination of the circumstances of union recognition agreements, and the Board appeared in *Casale* to have acknowledged as much.

The Petitioner's efforts to argue the merits of the "rule" or public policy in *Casale* are sometimes inconsistent with the record in this particular case, and with the apparent purposes of the statute. Petitioner argues, for example (Petition, page 19), that industrial peace is somehow not served in "cases like this one" if "no employee has ever raised any objection to union representation. . . ."[2] Obviously, industrial peace and

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2. The record does not reflect whether any unionized employees of American had ever objected to union representation.

quiet is most likely if unionized employees have never raised an objection to union representation, but that is not the issue that was presented in *American*, and it is not the only policy interest at stake under the NLRA. *NLRB v. Local 103, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers (Higdon Const. Co.)*, 434 U.S. 335, 344 (1978) ("Privileging unions and employers to execute and observe prehire agreements . . . may have greatly convenienced unions and employers, but in no sense can it be portrayed as an expression of the employees' organizational wishes."). *See also NLRB v. Goodless Electric Co.*, 124 F.3d 322, 330 (1st Cir. 1997) ("[G]eneral contract law principles cannot supplant the requirement of a federal labor policy such as that embodied in Section 9(a) requiring that employees be represented by an organization approved by a majority of employees."). The NLRA was clearly intended not only to serve peace and the expectations of employers and employees, but also to reflect actual choice of unions by employees themselves. The failure of proof in the case presented against American Automatic was the absence of evidence of employee choice. Petitioner's argument for industrial stability — that is, to disregard whether an actual majority supported any apparent grant of employer recognition occurring more than six months ago — would sacrifice the policy of employee free choice which is the keystone of the NLRA. 29 U.S.C. § 157. The appellate court correctly found in this case that Section 10(b) could not reasonably be interpreted to prohibit a construction employer like American from "challenging the validity of the evidence of effective voluntary recognition that is the basis of the *Board's* complaint." Pet. App. 21a, note 6. The Court of Appeals correctly held that American had properly raised "the question whether either [local union] satisfied the requirements for attaining . . . exclusive representative status through voluntary recognition." Pet. App. 19a.

Because the issue of Local 669's majority status (or lack of majority) was not rendered irrelevant by the passage of time since American's 1987 execution of Local 669's form documents, the issue remained whether Local 669 had established its majority status and attendant bargaining rights.

An employer is obligated under Section 8(a)(5) to bargain collectively with a union that has been "designated and selected for the purposes of collective bargaining by the majority of employees," pursuant to Section 9(a) of the Act, 29 U.S.C. § 159(a). The NLRB complaints against American Automatic alleged that the two union locals were and had been for some time the Section 9(a) representatives of American's employees in their respective bargaining units. Without a demonstration of Section 9(a) status, the charges against American would necessarily fail.

There is no dispute in this case that the origins of American's bargaining relationships with Local 536 and Local 669 were not in Section 9(a) contracts, but in construction-industry prehire agreements. Section 8(f) of the Act, 29 U.S.C. § 158(f), "allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the signatory employer without the union's majority first having been established in the manner provided for under § 9 of the Act." *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983). Neither an employer nor a union is obligated to enter into a Section 8(f) prehire agreement, which generally may be repudiated at any time before a union actually obtains Section 9(a) majority status. Absent "majority credentials . . . the collective bargaining relationship and the union's entitlement to act as the exclusive bargaining agent does not mature." *NLRB v. Local 103*, *supra*, at 346.

In a 1987 decision, *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988), the NLRB announced a series of important holdings concerning the NLRB's treatment of prehire collective bargaining agreements in the construction industry. Among other things, the Board recognized that a Section 8(f) contract could be repudiated, although holding that repudiation could not occur until the expiration date of a written collective bargaining agreement. *Id.* at 1387-88. Of particular relevance to this case,[3] the Board announced that if a party in the construction industry was attempting to show that a contract was not a voidable Section 8(f) agreement, but was a Section 9(a) agreement, "we will require the party asserting the existence of a 9(a) relationship to prove it." *Id.* at 1385 n.41 (emphasis added). The Board went on in *Deklewa* to state that a relationship between a union and employer could be "converted" from Section 8(f) to 9(a) status if voluntary recognition of the union by an employer "is based on a *clear showing of majority support* among the unit employees, e.g. a valid card majority." *Id.* at 1387 n.53 (emphasis added).

Having addressed Local 669's argument that Section 10(b) of the NLRA precluded even delving into American's bargaining history, the Court of Appeals in this case turned to the merits of the refusal-to-bargain charges against American, and to the threshold issue of whether the company even had an obligation to bargain with Local 669 or Local 536 in 1994. The court discussed the NLRB's *Deklewa* decision, and concluded that a union claiming a conversion from Section 8(f) status to Section 9(a)

3. The Court of Appeals reviewed and generally approved the Board's *Deklewa* ruling, which Petitioner does not contest.

bargaining rights had to make a showing of majority support (not just a grant of recognition by an employer) on some basis other than proving the compulsory union membership which could result (with or without the consent of affected employees) from a union-security clause contained in a Section 8(f) construction agreement. Pet. App. 23a-24a.

Local 669's claim of majority status was really documented only by evidence or information which proved the wrong proposition. The fringe benefit reports contained in the record, and the assertion that a majority of American's employees were members of Local 669 in 1987 at the time of the documents in question, proved nothing about voluntary employee free choice. As the court recognized, union membership was at that time required of the employees at American, and their membership (at least without more) did not signify any exercise of free choice. Pet. App. 24a, note 7. Petitioner responds by arguing that:

> And, contrary to the Fourth Circuit decision, the existence of a background union security clause is *not* a basis for invalidating the union's showing of interest based on the bargaining unit employee union membership. In the real word of affairs, voluntary majority union membership among bargaining unit employees comes first and a union security agreement comes second, not the other way around.

(Petition, page 24). The argument is simply inapposite. First, the Court was not involved in "invalidating" any evidence available to Local 669. Instead, the Court simply made the logical observation that where a current contract compels acquisition or retention of union membership, the presence

of a union member on a payroll does not, without more, demonstrate the employee's voluntary choice to become a union member.

Petitioner's assertions about the "real world" — its supposition that union membership levels can only be the product of free choice and grass-roots democracy — is certainly not supported by the record in this case, and is not consistent with the Act or its history. Section 8(f) authorizes employer acceptance of a pre-hire union-shop agreement before a single employee has even been hired, let alone given an opportunity to voice an opinion about unionization, so it is certainly true that not all union shops in the construction industry are the result of grass-roots pressure. Additionally, whether or not legally implemented, the prevalence of "top-down" organizing methods in the construction industry has long been noted by the courts. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982). Individuals employed in union shops who belong to labor unions may or may not voluntarily support a particular union. Since their membership is compulsory, their sentiment can not be presumed — it must be shown.

Local 669 complains that "before the Board, American Automatic did *not* challenge in any way Local 669's claim of majority support insofar as that claim rested on the bargaining unit employees' union membership." (Petition, at 26, emphasis in the original). For that reason, Local 669 now states (without any record support), "the Union did not put in any evidence as to the voluntary nature of that membership." In fact, American had filed answers to the NLRB complaints denying the existence of the requisite majority. As the court below concluded (in a unanimous opinion, with rehearing later denied by the full court), it

was not American's burden to disprove the existence of a union majority; it was the burden of the NLRB or union to prove the existence of that majority. Local 669, and presumably the General Counsel,[4] selected the evidence they presented at the administrative hearing not because of anything American did, but because of the parties' misplaced confidence that other evidence of majority support was simply not needed. Before the NLRB, where Local 669 had successfully prosecuted other cases involving the same documents, e.g., *Triple A Fire Protection*, 312 NLRB 1088 (1993), without additional evidence of majority support, that approach had been successful for the labor organization. In the Court of Appeals, however, where the legal issues raised by the complaints against American Automatic had not yet been tested, the Union's choice to rely on the same documentary case failed to convince the court, since the Court recognized the significance of the failure to offer meaningful evidence of majority support.

Petitioner now argues that:

> If put to the test, Local 669 with the greatest assurance could have made its proof that the union membership here were purely voluntary and strongly held, and that those memberships actively respected the members' designation of the Union as their chosen exclusive collective bargaining representative.

(Petition, page 26). American contended before the Court of Appeals, and has contended since 1995 in the proceedings

4. Pursuant to Section 3(d) of the statute, 29 U.S.C. § 153(d), the cases were actually prosecuted not by Local 669, but by the NLRB General Counsel, who also did not offer such evidence.

before the NLRB, that the NLRB and the charging unions *were* "put to the test" of proving majority support — during the NLRB's 1995 trial. Petitioner complains that American somehow presented to the Court of Appeals a "belated, non-record based, challenge to the Union's showing of majority support. . . ." (Petition, at 26). That is simply not accurate. It is Local 669 which, four years after the administrative trial, argues that it "could have made its proof." Whatever it now believes could have done, the Petitioner failed to make its case at the time of trial provided under the Act, and certainly cannot do so now.[5] American respectfully submits that the Court of Appeals reached a reasonable and correct decision in this case, and that it was the record made by all of the parties which both supports and requires the conclusion reached by the Court of Appeals.

REASONS FOR DENYING THE WRIT

Respondent American respectfully submits that for a number of reasons granting the petition for certiorari in this case is neither essential nor appropriate. Whether or not the Petitioner agrees with the reasoning of the Court of Appeals in this case, Petitioner has not substantiated its claim (Petition, at 13) of "a conflict in the circuits on a recurring questions [sic] of great moment to the proper administration of the National Labor Relations Act", and has failed to make a convincing case for review by the Supreme Court.

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5. Ironically, Petitioner argues that the Court of Appeals decided an issue on the basis of "a few snippets of non-record fact" tendered by a party who failed to raise the issue before the administrative agency (Petition, page 27). American did not assert the existence of non-record facts before the Court of Appeals, and does not do so now. It is the Petitioner which asks this Court, without a shred of record evidence, to credit its claim that it "could have" proven its case four years ago.

First, it is noteworthy that the National Labor Relations Board has not itself petitioned for review in this case. While an intervenor labor union has the formal right to petition for review by this Court, the fact that the NLRB has not petitioned for certiorari is significant. It is the NLRB which is charged by statute with administering and developing national labor law policy. It is the NLRB which is responsible to monitor and understand the development of case law both in the appellate courts and on the NLRB's own docket of pending cases and anticipated decisions. Respondent American submits that the NLRB's choice not to petition for review may well reflect an NLRB determination that review by this Court is not appropriate.

There are a number of reasons for concluding that review of this decision by the Supreme Court would not be necessary or helpful to American labor and industry in general. Respondent American has argued, *supra*, that the decision of the Fourth Circuit was legally sound and correct on the facts in this case for a number of reasons, but the dispute which Petitioner would now bring to the Court's docket is itself particularly fact-based. The collective bargaining documents upon which Local 669 relies for its claim of Section 9(a) status were, the court below noted, "form" documents created by Local 669 for its signatory contractors. In fact, where Local 669 attempts to point to a split of opinion in the federal circuits on the issue of the union's requisite majority status, it has in large measure pointed only to a division in circuits examining and interpreting Local 669's identical form documents. *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 795 (1999)[6];

6. The decision of the Eleventh Circuit in *Triple A* is not identical to the situation in *American Automatic*. In *Triple A*, the (Cont'd)

MFP Fire Protection, Inc. v. NLRB, 101 F.3d 1341 (10th Cir. 1996)[7]. Such a split of federal judicial opinion may have practical implications for this labor union doing business in more than one circuit, but that practical interest of Local 669 does not demonstrate the significance of the issue to other unions or employers, and does not justify the review sought here.[8]

Notwithstanding Local 669's overheated depiction of the dire effects of the *American Automatic* decision, a simple citation check as of the writing of this Response has not revealed *any* reported decisions even mentioning the Fourth Circuit's *American Automatic* ruling, which is now eight months old. Though the ruling may have raised practical questions about the efficacy of Local 669's form documents, the decision has certainly not created the reverberations for others which Local 669 has predicted in its Petition.

(Cont'd)
court noted, 136 F.3d at 735, that the company had, except for an unsuccessful coercion claim, failed "to argue that there was no conversion to full section 9(a) status" and "does not argue that there was merely a section 8(f) relationship. . . ." Those were, of course, precisely the arguments successfully made by American in this case.

7. The brief opinion in *MFP Sprinkler* cited only two of the NLRB's decisions, and did not discuss or consider the authorities examined by the Fourth Circuit in this case.

8. American continues to operate its business in an unresolved Chapter 11 bankruptcy proceeding. American's need for finality in this litigation, which has gone on for more than four years, should be balanced against Local 669's interest in a legal issue of interest to the union.

One reason that the *American Automatic* decision may not yet have found its way into other labor and management controversies is the fact-based nature of the *American Automatic* case. The Court of Appeals certainly did not say that construction unions which were parties to Section 8(f) agreements with employers could never demonstrate a successful conversion to Section 9(a) status. It is clear that in some manner such a change can be accomplished. The debate in this case has been whether the evidence relied on to show such majority status sufficiently reflected the existence of a free and uncoerced majority of employees necessary to give the union the desired status as an exclusive bargaining agent under Section 9(a).[9]

The problem in this case was not a disagreement about whether proof of majority status should be required by the NLRB or reviewing courts; the dispute is whether a sufficient showing was made. Local 669, in fact, now confidently claims that "if put to the test" it would have been well-armed to demonstrate actual employee choice or designation of the union as an exclusive bargaining agent. The appellate court opinion in *American Automatic* certainly spells out the necessity for unions to produce such evidence if they are, in the future, "put to the test" of supporting an unfair labor practice charge against an employer. Accordingly, even if the Fourth Circuit incorrectly required unnecessary evidence from complaining unions, there is no reason for believing that the unions will not provide the required evidence of majority support just as easily as Local 669 now claims that it could.

9. Local 669's Petition makes no mention of the lower court's disposition of the Section 9(a) issue raised on behalf of its companion organization, Local 536. The court in fact found that the evidence as to that local as well failed to show, either through contract language or testimony, that the Local had attained majority support among American's employees. Pet. App. 25a-28a.

Finally, Respondent American submits that a review by this Court of the Fourth Circuit decision is not required or warranted by the lower court's discussion of *Casale Industries*, or the issue of time limits under the NLRA. While Local 669 has pointed to a contrast in the circuits concerning the NLRB's use of *Casale*, American has pointed out, *supra*, that there remains significant uncertainty about the NLRB's foundation for *Casale*, and its precise meaning. It may well be that the NLRB's review of *Casale*, and a rationalization of the administrative agency's views, will follow from the announcement of the decision in *American Automatic*. Certainly, such a clarification by the NLRB would be appropriate. Given the comparative newness of the issue, the absence of substantial settled precedent in the lower courts, and the possibility of refinement or revision of the NLRB stance on this issue, Respondent American submits that granting review of the decision in this case could inject the Court into an issue which has not yet fully been litigated or settled by the parties to whom it most matters.

CONCLUSION

Respondent American Automatic Sprinkler Systems, Inc. respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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